October 15, 1981, when the solicitors for the appellant, acting as attorney for the vendors, gave notice to the said Tajuddin s/o Md. Kassim to rescind the 1977 agreement on grounds of the latter's defaults in the payment of the balance of the purchase money and demanded that vacant possession be delivered within one month from the date of the notice. The said Tajuddin s/o Md. Kassim refused to comply with the notice and has apparently been in possession of the said property up to the present day.

Then the appellant with the limited grant of letters of administration granted to him entered into a sale and purchase agreement in respect of the same land on December 28, 1983, with one Soon Seng Co. Sdn. Bhd. for an agreed purchase price of $1.5 million. Upon being informed of this transaction the respondent acting as attorney for the said Tajuddin s/o Md. Kassim lodged a private caveat on the said land on June 7, 1984, purportedly to protect his principal's interest under the 1977 agreement. On February 6, 1985, the appellant acting as the administrator of the estate of the deceased obtained a court order for the sale of the said land to the said Soon Seng Co. Sdn. Bhd.

Many issues were raised before the learned judge and also before us on appeal. In our opinion for the purpose of the application before the learned judge all that the court need apply is the principle as stated by Lord Diplock in the landmark case of *Eng Mee Yong & Ors.* v. *V. Letchumanan*[1] that in an application under section 327 of the National Land Code the caveator must first satisfy the court that on the evidence presented his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that the balance of convenience is in favour of the *status quo* until the trial of the action.

Here the 1977 agreement was a conditional agreement and as far as the record shows none of the conditions have been fulfilled. The appellant is the attorney for four of the beneficiaries, but he was not an administrator when he entered into the 1977 agreement as attorney for the beneficiaries. He obtained the limited grant of letters of administration on April 12, 1983.

He has obtained the court order dated February 6, 1985, to effect the sale and purchase agreement.

Because of the defaults in the payment of instalments by the said Tajuddin s/o Md. Kassim the amount owed by the estate of the deceased to the Bank was at January 31, 1982, in the sum of $214,281.04.

The court order of sale dated February 6, 1985, was a consent order involving the appellant and the six beneficiaries of the estate including all the four female beneficiaries who had earlier refused their consents to the 1977 agreement.

The appeal was accordingly allowed with costs to the appellant.

Appeal allowed.

Solicitors: *Kam Woon Wah & Co. ; Murthi & Partners.*

CHUNG KHIAW BANK LTD. v. TIO CHEE HING

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) September 25, 1986 & April 28, 1987]

[Kota Kinabalu – Supreme Court Civil Appeal No. 256 of 1985]

Practice and Procedure – Pleadings – Application to strike out writ and statement of claim on grounds that it disclosed no reasonable cause of action or it was vexatious and an abuse of process of court – Matter relied on time-barred – R.H.C. 1980, O.18 r.19.

Limitation – Matter relied on time-barred – Suit brought after 3 years.

The respondent had charged his land to the appellants, the first time prior to 1968 and the second time in August 1968. The appellants registered the first charge on August 14, 1968, and the second charge on August 13, 1968. The respondent alleged that the appellants had fraudulently obtained the first charge. The appellants had obtained judgment against the respondent in 1969 and an order of execution had been made against the respondent. The respondent then brought an action praying for an order that the judgment entered against him be set aside and all execution proceedings be stayed. The appellants then applied to have part of the indorsement of claim struck out and this application was granted by the learned Judge. He also dismissed the application of the respondent to amend the statement of claim to include an allegation of fraud. The respondent subsequently brought an action alleging that the appellants had taken an unfair advantage of his financial difficulties in executing the first and second charges and struck an unconscionable bargain. He therefore claimed the charges were never valid and ought to be cancelled. The appellants applied to strike out the respondent's writ and statement of claim on the grounds that it disclosed no reasonable cause of action or that it was vexatious and an

abuse of the process of the court and the matter relied on was time-barred having occurred more than three years before the issue of the writ. The learned trial Judge dismissed the application and the appellants appealed.

Held, allowing the appeal: (1) the learned trial Judge had erred in not holding that the suit brought by the respondent disclosed no reasonable cause of action and is vexatious and an abuse of the process of the court;

(2) on the issue of limitation, the respondent should also fail, the matter on which he relied on having occurred more than three years before the issue of the writ.

Cases referred to:

(1) *Re Vernazza* [1959] 2 All E.R. 200.
(2) *Tractors Malaysia Berhad* v. *Tio Chee Hing* [1975] 2 M.L.J. 1.

SUPREME COURT.

Alex Khoo (*David Wong* with him) for the appellants.

N. Chandran (*Abdul Razak Rouse* with him) for the respondent.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): By Summons-in-Chambers dated January 8, 1985, the appellants in this appeal applied under Order 18 r.19 of the Rules of the High Court 1980 and under the Court's inherent jurisdiction to strike out respondent/plaintiff's writ and statement of claim dated August 27, 1982, as amended on October 26, 1984, on the grounds that it either disclosed no reasonable cause of action or alternatively that it was vexatious and an abuse of the process of the court, and the matter relied on was time-barred having occurred more than 3 years before the issue of the writ.

The learned Judge declined to grant the application, holding that there were triable issues and undue influence to go to trial, and that the matter was far from plain and obvious.

Before us learned counsel for the appellants, dealing with the first four grounds of the Memorandum of Appeal, submitted that the learned Judge had failed to look into the whole history of this matter, pointing out that this is the 5th time this very matter is coming up on appeal, and that Order 18 r.19(b) *i.e.* that the writ was scandalous, frivolus and vexatious, and (d) *i.e.* it is otherwise an abuse of the process of the court, had indeed been made out in the court below. In addition, counsel also reiterated that (this refers to Ground 6) the suit is time-barred, having been brought more than 3 years too late.

Let us examine what the learned trial Judge had to say about the background of this matter in his judgment. The respondent, he noted, is or was the owner of the land which he referred to as the "subject land" enumerated in paragraph 1 of the statement of claim, *i.e.* Lahat Datu Lease Nos. 10780, 10793, 10975, 10976, 10800, 10801, 10806, 10784, 10785, 10792 and 30809. Of these, land held under lease Nos. 10784, 10785, 10792 and 30809 had been subdivided into 81 subdivided titles. Some time prior to 1968 the respondent (Tio), his Lordship notes, charged the said land to the Lahat Datu Branch of appellants' Bank for $300,000 excluding interest and other charges for facilities extended to Southern Estate Sdn. Bhd. with which he was associated. In 1968, Tio was developing Lahat Datu township through a company called Southern Development Sdn. Bhd. (the company). The company being in need of money, Tio alleged that the appellant bank agreed to provide $1.4 million to him and/or his company and such loan to be secured by a charge to be created on the land. Tio executed the charge on August 9, 1968 (the first charge). He complains that the contents of the charge was never explained to him. One should bear in mind his claim that he does not know much English. The appellants' manager then said that the first charge was not acceptable and that he wanted a separate charge to clear off the existing charge in their favour. Accordingly, on August 10, 1968, Tio executed another charge (second charge) again prepared by appellants' solicitors, and identical in terms with the first charge apart from the amount, which was $400,000, the property charged being Tio's coconut estate held under CL 173397.

Appellants registered the first charge on August 14, 1968, (Memorial No. 92666) and the second charge on August 13, 1986. Tio complains that the appellants had fraudulently obtained the first charge. In paragraphs 9 and 10 of his statement of claim he set out the particulars of his charge of fraud alleging that the appellants had no intention of providing money under that charge, no account was opened for it and no money was paid under it. Appellants had, he added, consistently refused to provide evidence of money allegedly provided under the first charge, and had tricked him into executing the two charges and the appellants had made dishonest use of the first charge and purported to realise it even though no loan had been made under it.

His Lordship noted that paragraph 11 of the statement of claim alleged that appellants took unfair advantage of Tio's financial difficulties in executing the first and second charge and struck an unconscionable bargain. Tio maintained that whilst appellants had independent legal advice he did not have any. In paragraph 12 respondent asserted that the appellants had exerted undue influence over him in the transactions mentioned. He therefore claimed that the charge was never valid and ought to be cancelled. In paragraph 14 Tio added that in Land Enquiry No. 3 of 1980, appellants applied for and obtained an order for sale and proceeded to sell by public auction the property towards recovering repayment of the fictitious loan, adding that he would suffer irreparable damage if the sale was allowed to proceed. In paragraph 16 of the statement of claim Tio alleged that he first knew of the fraud at the end of 1980 and on February 12, 1982 he lodged a police report at Sandakan, and had made several unsuccessful attempts himself and through his solicitors for further particulars about the alleged loan. He therefore prayed for an order for delivery and cancellation of charge 92666, the first charge, and an injunction restraining the appellants from proceeding with the sales of the property, as well as an order to set aside the orders of the Collector in Land Enquiry Nos. 3, 4 and 5 of 1980.

Coming back to submissions by counsel for the appellants, we were referred to the English decision in *Re Vernazza*[1] the facts of which are as follows:-

In 1935 V. sued a company for £158,982 for breach of contract and/or wrongful dismissal. The action was dismissed in 1937. In 1938 V. brought an action in the Chancery Division, claiming that the judgment in the earlier action should be set aside; in this action the statement of claim was struck out as vexatious. In 1938, 1939, 1940, 1952, 1953, 1957, 1958 and 1959 he took further proceedings or steps in proceedings before the courts arising out of the same claim as had been the subject of action; all these were dismissed or refused. On a motion for an order under section 51(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that no legal proceedings should be instituted by V. without the leave of the High Court or a judge thereof, it was contended on V's behalf that as the process issued disclosed a cause of action, except in the second action where the statement of claim was struck out, the proceedings were not vexatious.

It was held that in determining whether proceedings were vexatious the court must look at the whole history of the matter, not solely at the question whether the pleadings had disclosed a cause of action.

Another authority cited to support the same proposition is the Privy Council decision in *Tractors Malaysia Berhad* v. *Tio Chee Hing.*[2] The appellants there had obtained a consent judgment against the respondent. Respondent applied in the same action to have the judgment set aside but the application was dismissed. Subsequently respondent brought an action to set aside the consent judgment in the former action. The learned trial judge set aside the proceedings on the ground that the action was frivolous and vexatious and brought to defeat the course of justice in the hope of delaying the execution of the judgment. On appeal to the Federal Court, it was held that the respondent's statement of claim raised triable issues which were *prima facie* sustainable. The Federal Court regarded themselves as precluded from examining the evidence for the purpose of determining whether it was a clear inference from the facts in evidence which were undisputed that the action was bound to fail. They therefore allowed the appeal so that the action should be allowed to proceed to trial.

The Privy Council held that in not submitting the evidence to critical examination, the Federal Court was in error. Had they done so, they would have come to the same conclusion as the High Court judge that the action was brought to defeat the course of justice in the hope of delaying the execution of the judgment in the earlier action.

The respondent bank were the plaintiffs in Civil Suits Nos. 181 and 182 of 1969 and Tio the defendant on this very same subject matter as the instant appeal. The bank obtained judgment in both suits and an order of execution had been made against Tio. His appeal against the order of execution was dismissed.

Tio then filed Civil Suit No. 1520 of 1979 at the High Court in Kota Kinabalu alleging that the present respondent was in breach of an agreement and prayed for an order that the judgment entered against him (Tio) in the two Civil Suits aforementioned be set aside and all execution proceedings be stayed until the trial of Civil Suit No. 1520 of 1979.

Soon after entering appearance respondents applied by way of Summons-in-Chambers to have

part of the Indorsement of Claim struck out. Those parts the bank sought to strike out were:

(a) for an order that the judgment entered against the plaintiff (Tio) by the defendant (the bank) in C.S. No. 181/69 and 182/69 be set aside; and

(b) that all execution proceedings so instituted or to be instituted in the future in C.S. No. 181/69 and 182/69 be stayed until the suit be tried.

The learned trial Judge (Haji Wan Mohamed J.) noted that Tio had in fact tried on many occasions to stop the respondent bank from proceeding with the order of execution and had invariably failed for lack of merit in each and every application. The Judge therefore held that the indorsements earlier mentioned were frivolous and vexatious and otherwise an abuse of the process of the court, and accordingly ordered them to be struck out.

Also in the same judgment the Judge considered Tio's application to reamend the amended statement of claim to include an allegation of fraud.

He noted that on February 5, 1980, counsel for the defendants (the present respondent) had filed a written submission, a copy of which was provided to Tio on February 6 1980, and the relevant part of which is a citation from *Halsbury's* Laws of England Vol. 22 paragraphs 1669 and 1670 which says that no final judgment may be set aside in an action except in an action for fraud on fresh evidence which would have material effect upon the decision of the Court. After that submission had been made Tio sought leave to reamend his amended Statement of Claim to include fraud. The learned Judge found that this prayer to reamend was not made *bona fide,* remarking that since the judgment in the two earlier cases had been made in 1970 it was most improbable that Tio had over ten years later just come to realise that these judgments had been obtained fraudulently. He therefore dismissed the application to reamend the amended Statement of Claim.

In the instant suit under appeal, Civil Suit No. 1170 of 1982, the learned trial Judge did consider at some length the history of this whole matter, though unfortunately it was examined through the eyes as it were of Tio, being confined to facts referred to in his Statement of Claim. We need not set out in detail the facts so considered except to say they are set out in pages 184 to 190 of the Record.

Therefore the appellate court is placed at no disadvantage in drawing its own inferences as it would otherwise have been if it had been dealing with findings of facts arising from *viva voce* testimony before the learned trial Judge. In addition this court has the added advantage that it could review the history as seen not merely through the eyes of Tio, but also take into account a lot of other matters which Tio himself can hardly dispute.

Having therefore given careful consideration to the whole history of this unfortunate affair we must, with respect, say that the learned Judge had erred in not holding that this suit brought by the respondent Tio discloses no reasonable cause of action and is vexatious and an abuse of the process of the court.

In the result this appeal on those counts alone should be allowed with costs here and below.

It also follows that on the issue of limitation, the respondent should also fail, the matter on which he relied having occurred more than 3 years before the issue of writ.

Appeal allowed.

Solicitors: *Peter Loh & Co.; Rayner & Co.*

TAY GUAN HO v. CHIN HUAT HIN CO.

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) April 30 & May 26, 1986 & May 2, 1987]

[Kota Kinabalu – Supreme Court Civil Appeal No. 429 of 1985]

Partnership – Whether property partnership property – Property bought by partner in his own name – Whether transferred by proprietor – Whether property held on constructive trust for partnership – Partnership Act, 1961, ss. 22 & 23.

Trust – Constructive trust – Mere declaration of trust not sufficient to confer any interest in land – Whether Statute of Frauds applicable – Law of Property Act, 1925 – Sabah Application of Laws Ordinance, 1951.

In this case one Tay Gek Lin (deceased) founded the respondent firm and ran it on a sole proprietorship